

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

May 13, 2004

IN RE:

**UNITED CITIES GAS COMPANY, a Division of
ATMOS ENERGY CORPORATION
INCENTIVE PLAN ACCOUNT (IPA) AUDIT**

**PETITION OF UNITED CITIES GAS COMPANY
TO AMEND THE PERFORMANCE BASED
RATEMAKING MECHANISM RIDER TO ITS TARIFF**

**DOCKET NO.
01-00704**

**ORDER GRANTING IN PART AND DENYING IN PART CONSUMER
ADVOCATE'S MOTION TO COMPEL DISCOVERY**

This matter came before the Hearing Officer pursuant to the *Consumer Advocate's Motion to Compel Discovery* ("Motion to Compel") filed by the Consumer Advocate and Protection Division ("Consumer Advocate" or "CAPD") on May 12, 2004. Staff of the Energy and Water Division of the Tennessee Regulatory Authority ("Staff") filed *Responses to the Consumer Advocate's Motion to Compel Discovery Served on the Tennessee Regulatory Authority Staff* on May 12, 2004. United Cities Gas Company (hereinafter "Atmos Energy Corporation" or "Atmos" or "AEC") filed its *Response of Atmos Energy Corporation to the Consumer Advocate's Motion to Compel* on May 12, 2004.

Procedural History

At a Status Conference held on April 22, 2004, the Hearing Officer granted the Consumer Advocate's *Motion for Extension of Time to Respond to the Motion to Consolidate and to Approve Settlement Agreement* in part, but only to the extent of allowing additional discovery and an extension of time for the Consumer Advocate to file its response. By agreement of the Parties, additional discovery was limited to the issue of "whether the proposed settlement agreement is in the public interest." A Procedural Schedule was proposed jointly by all Parties at the Status Conference and was accepted by the Hearing Officer. The Procedural Schedule, issued in writing on April 28, 2004, set forth the deadlines for discovery and included a Status Conference to be held on May 10, 2004, to address any Objections to Discovery Requests. Pursuant to that schedule, the Consumer Advocate served Interrogatories and Requests for Production on Staff and Atmos on April 30, 2004. In response to these discovery requests, Objections to Discovery were filed by the Staff and Atmos on May 4, 2004. Responses to the Interrogatories and Requests for Production were filed by Staff on May 7, 2004 and by Atmos on May 10, 2004.

At the Status Conference on May 10, 2004, each Objection filed by either Staff or Atmos was discussed. An amendment to the Procedural Schedule was proposed to allow for the resolution of discovery issues within the time frame of the existing Procedural Schedule. No Party objected to the amended Procedural Schedule.

The Consumer Advocate filed its *Motion to Compel* on May 12, 2004. Staff filed *Responses to the Consumer Advocate's Motion to Compel Discovery Served on the*

Tennessee Regulatory Authority Staff and Atmos filed Response of Atmos Energy Corporation to the Consumer Advocate's Motion to Compel on May 12, 2004.

General Discovery Principles

Tenn. Comp. R. & Regs. 1220-1-2-.11 requires that, when informal discovery has failed or is not practicable, discovery in contested cases before the Authority is to be effectuated in accordance with the Rules of Civil Procedure. Rule 26 permits discovery through oral or written depositions, written interrogatories, production of documents or things, and requests for admission.¹ A party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.² Discovery may be limited if: (1) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.³

Rule 37.01 permits a party to file a motion to compel if a party fails to answer an interrogatory, including providing an evasive or incomplete answer.⁴ Decisions to grant a motion to compel rest in the trial court's reasonable discretion.⁵

¹ Tenn R Civ P 26 01 (2004)

² Tenn R Civ P 26 02(1) (2004)

³ *Id*

⁴ Tenn R Civ P 37 01 (2004)

⁵ *Kuehne & Nagel, Inc v Preston, Skahan & Smith International, Inc*, 2002 WL 1389615, *5 n 4 (Tenn Ct App June 27, 2002)

Request for Production No. 1 Served on Atmos

Request for Production No. 1, served on Atmos on April 30, 2004, asked for the following:

Copies of any and all documents reviewed to prepare your answers or responses to these Interrogatories.⁶

In its Response to Interrogatory No. 3, filed on May 10, 2004, Atmos refers the Consumer Advocate to several documents, including “the transportation contracts at issue.”⁷

In its *Motion to Compel*, the Consumer Advocate states its grounds supporting the request to compel production of “transportation contracts at issue” identified in Atmos’ Response to Interrogatory No. 3 and requested in Request for Production No. 1 as follows:

AEC identifies the “contracts” but has not provided them or specified that the “contracts” were previously submitted to the Consumer Advocate. A proper response to this request and the interrogatory would have identified the universe of “contracts” referenced by AEC and attach copies.⁸

Atmos responds that “[t]he transportation contracts the Company identified in its response to Request to Produce No. 1 have previously been provided to the CAPD.” However, Atmos agrees to provide additional copies of the contracts to the Consumer Advocate no later than close of business on Thursday, May 13, 2004.⁹

Based upon this agreement by Atmos to provide the contracts, the Hearing Officer finds that the *Consumer Advocate’s Motion to Compel Discovery* as to Request for Production No. 1 should be granted and Atmos is ordered to produce the “transportation

⁶ *Attorney General’s Interrogatories to Atmos Energy Corporation*, p. 7 (April 30, 2004)

⁷ *Responses of Atmos Energy Corporation to the Attorney General’s Interrogatories and Requests to Produce*, p. 2 (May 10, 2004)

⁸ *Consumer Advocate’s Motion to Compel Discovery*, p. 6 (May 12, 2004).

⁹ *Response of Atmos Energy Corporation to the Consumer Advocate’s Motion to Compel*, p. 2 (May 12, 2004)

contracts at issue” to which it referred in its Response to Interrogatory No. 3 by the close of business on May 13, 2004.

Interrogatory No. 6 Served on Staff and Atmos

The Consumer Advocate seeks to compel Staff and Atmos to file a supplemental response to Interrogatory No. 6, which asks:

Explain in detail the extent to which the FERC Order: Modification of Negotiated Rate Policy, Natural Gas Pipeline Negotiated Rate Policies and Practices, 104 FERC ¶ 61,134 (2003) may be relevant to the question of whether the proposed settlement is in the public interest.¹⁰

Staff responded on May 7, 2004 as follows:

Although Staff reserves the right to review this document to the extent it is relied upon by any party to this docket in support of any contention in this docket, Staff is unfamiliar with this document and has not relied on it in any way in reaching the proposed settlement in this docket. To the extent that this question seeks to determine whether this documentation is relevant to the issue of whether this document is relevant to the issue of whether the proposed settlement results in an amendment to the PBR tariff that is just and reasonable, Staff would preliminarily state that the document is apparently irrelevant to this issue.¹¹

Atmos responded on May 10, 2004 as follows:

It is the Company's position that the referenced FERC Order is not relevant to the question of whether the proposed settlement should be approved.¹²

In its *Motion to Compel*, the Consumer Advocate states its grounds supporting the request to compel a response to Interrogatory No. 6 as follows:

Neither party explains in detail the extent to which the order in[sic] not relevant. Had the question simply called for a yes or no on whether the order was relevant the effort might be responsive. However, the

¹⁰ *Attorney General's Interrogatories to Atmos Energy Corporation*, p 6 (April 30, 2004) and *Attorney General's Interrogatories to the Tennessee Regulatory Authority Staff*, p 6 (April 30, 2004)

¹¹ *Responses to Attorney General's Interrogatories and Requests for Production Served on the Tennessee Regulatory Authority Staff*, pp 4-5 (May 7, 2004).

¹² *Responses of Atmos Energy Corporation to the Attorney General's Interrogatories and Requests to Produce*, p 4 (May 10, 2004)

interrogatory goes further in seeking an explanation of the extent that the order may be relevant. If AEC and the TRA Staff truly believe the order is not relevant then each must explain why.¹³

In its Response to the *Motion to Compel* filed on May 12, 2004, Staff states that it has “fully answered” Interrogatory No. 6 and that it has “stated its current level of familiarity with the [FERC Order].”¹⁴ Staff continues by arguing that “the extent of the relevancy of something that is irrelevant (i.e. not relevant at all) is, of course, no extent at all.”¹⁵ Staff also argues that it “should not be required to further speculate whether the Consumer Advocate intends to rely on this document and for what purpose” and that “if such a burdensome precedent were set Staff might soon be confronted with additional ‘discovery’ in the form of an extensive reading list.”¹⁶

In its Response to the *Motion to Compel* filed on May 12, 2004, Atmos restates that the Company’s position is that the FERC Order is not relevant at all.¹⁷ Atmos argues that the Consumer Advocate is attempting to “force the company to guess what position the CAPD will take with regards to the FERC order” and that the “CAPD cannot force the company to take a position with regard to FERC order the Company has stated it believes is not relevant at all.”¹⁸ Further, the Company argues the Consumer Advocate “must prepare its own arguments based on this FERC order” and “cannot force the Company and Staff to formulate those arguments for it.”¹⁹

¹³ *Consumer Advocate’s Motion to Compel Discovery*, p. 7 (May 12, 2004)

¹⁴ *Responses to Consumer Advocate’s Motion to Compel Discovery Served on the Tennessee Regulatory Authority Staff*, p. 2 (May 12, 2004)

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Response of Atmos Energy Corporation to the Consumer Advocate’s Motion to Compel*, p. 2 (May 12, 2004)

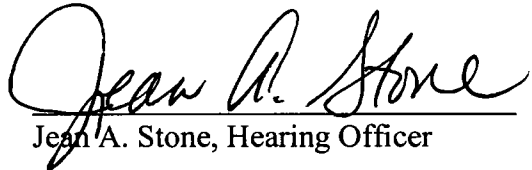
¹⁸ *Id.*

¹⁹ *Id.* at pp. 2-3

The request to explain the relevance of the FERC Order requires the Staff and Atmos not to state a fact, but to render an opinion. Although opinions of expert witnesses are discoverable, the discovery request was not directed toward any expert. However, even if the opinions of Atmos and Staff as to the relevance of the FERC Order are discoverable, both Atmos and Staff have responded that the FERC Order is not relevant and thereby have explained fully the "extent to which [the FERC Order] may be relevant." Therefore, the Hearing Officer finds that Interrogatory No. 6 has been answered. For the foregoing reasons, the Hearing Officer concludes the *Consumer Advocate's Motion to Compel Discovery* concerning Interrogatory No. 6 should be denied.

IT IS THEREFORE ORDERED THAT:

1. The *Consumer Advocate's Motion to Compel Discovery* is granted in part and denied in part as set forth herein..
2. Atmos Energy Corporation shall respond to the Consumer Advocate's *Request for Production No. 1* as set forth herein by the close of business on Thursday, May 13, 2004.


Jean A. Stone, Hearing Officer